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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 JOHN D. CURL,

9 Plaintiff,

10 v.

11 NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

12 Defendant.

CASE NO. 17-5216

**ORDER REVERSING THE
COMMISSIONER AND REMANDING
FOR FURTHER PROCEEDINGS**

13 John D. Curl appeals the ALJ's decision finding him not disabled. The ALJ found Hairy
14 Cell Leukemia is a severe impairment; Mr. Curl has the RFC to perform light work with
15 additional limitations; and that he can perform past relevant work as a claims examiner. Tr. 22-
16 32. Mr. Curl contends the ALJ erred by misevaluating his testimony and the medical evidence,
17 and by failing to find at step two that his mental disorders are severe impairments. Dkt. For the
18 reasons below the Court **REVERSES** the Commissioner's final decision and **REMANDS** the
19 matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

20 **DISCUSSION**

21 **A. Mr. Curl's Testimony**

22 Mr. Curl first contends the ALJ erred in rejecting his testimony about the severity of his
23 limitations. Dkt. 9 at 4. The ALJ did not find Mr. Curl was malingering and was therefore

1 required to provide clear and convincing reasons to reject his testimony. *Smolen v. Chater*, 80
2 F.3d 1273, 1283-84 (9th Cir. 1996). The ALJ rejected Mr. Curl's testimony for several reasons,
3 at least one of which is valid and supported by substantial evidence. In specific, the ALJ found
4 that after Mr. Curl was laid off in 2013, he received unemployment benefits, reporting he was
5 ready, able, and willing to perform full-time work during the period he alleged he was disabled.
6 The ALJ further found Mr. Curl sought and applied for jobs during this time. Tr. 30. Mr. Curl
7 argues the ALJ erred because the ALJ "did not indicate how this calls the claimant's credibility
8 into question," and the Supreme Court in *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795
9 (1999), indicated an individual's willingness to perform "accommodated work" is not
10 determinative of whether an individual is disabled for SSDI purposes. Dkt. 9 at 10.

11 The law and record do not support Mr. Curl's argument. The *Cleveland* decision did not
12 address whether the ALJ may consider a claimant's application for unemployment benefits in
13 weighing the claimant's testimony. The Ninth Circuit has held the ALJ may consider a
14 claimant's application for unemployment benefits during the alleged disability period, in which
15 the claimant certified an ongoing search for full-time employment. *Jorgensen v. Berryhill*, 680
16 Fed. Appx. 612, 613 (9th Cir. 2017) citing *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d
17 1155, 1161-62 (9th Cir. 2008). Here Mr. Curl testified he received disability benefits
18 representing he was applying for full-time work, not part-time or "accommodated" work. Tr. 50.
19 Accordingly the Court finds the ALJ's rationale is supported by substantial evidence.

20 The ALJ gave other reasons to reject Mr. Curl's testimony which need not be discussed.
21 Even assuming the other reasons are erroneous, the error would be harmless. This is because the
22 ALJ provided at least one valid reason supported by substantial evidence. *See Carmickle*, 533
23 F.3d at 1162.

1 **B. Medical Evidence**

2 Mr. Curl contends the ALJ misevaluated the opinions of examining doctor John Neer,
3 Psy.D., and reviewing doctors Michael Brown, Ph.D., and Cynthia Collingwood, Ph.D. Dkt. 9 at
4 12, 15.

5 **1. Dr. Neer**

6 Dr. Neer opined Mr. Curl could perform simple and repetitive tasks as well as detailed
7 and complex tasks. Tr. 297. The ALJ accepted this opinion but rejected Dr. Neer’s determination
8 that “based on [Mr. Curl’s] report, his fatigue is likely to interfere with his ability to work a full
9 shift or long periods of a day.” Tr. 25. The ALJ reasoned the doctor’s determination was based
10 upon Mr. Curl’s subjective reports and that Dr. Neer is not a medical doctor and the opinion is
11 thus outside the scope of his evaluation. *Id.* The Commissioner contends the ALJ properly
12 rejected Dr. Neer’s opinion because it was based upon the discredited self-reports of Mr. Curl.

13 But an ALJ does not provide clear and convincing reasons for rejecting an examining
14 doctor’s opinion by questioning the credibility of the applicant’s complaints when the doctor
15 does not discredit those complaints and supports her ultimate opinion with her own observations.
16 *Edlund v. Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001). Here, Dr. Neer did not question Mr.
17 Curl’s credibility. The doctor stated Mr. Curl’s report of fatigue would interfere with his ability
18 to work, but that is not the sole basis for his opinions. Dr. Neer also stated “He does appear to be
19 somewhat depressed with low energy and difficulties with concentration and attention.” Tr. 297.
20 This is a clinical observation the doctor made of Mr. Curl, and one which the ALJ failed to
21 address. This failure is harmful because the ALJ did not provide a reasoned basis to conclude Dr.
22 Neel’s opinion is more heavily based on Mr. Curl’s self-reports than on clinical observations. *See*
23 *e.g., Ghanim v. Colvin*, 763 F3d 1154, 1162 (9th Cir. 2015).

1 The ALJ also erred in rejecting Dr. Neer's opinion as outside the scope of the
2 psychological evaluation. Dr. Neer opined Mr. Curl's current psychiatric issues appear to be
3 secondary to his medical condition. Because Mr. Curl's physical and mental problems are
4 intertwined, his limitations flow from their combined impact, and were therefore within the
5 scope of the evaluation. The ALJ accordingly erred as matter of law. *See Farris v. Barnhart*, 147
6 Fed. Appx. 638, 639 (9th Cir. 2005) (ALJ erred in rejecting psychologist's opinion based upon
7 the combined impact of back pain and mental impairment which the ALJ found was outside the
8 doctor's expertise.)

9 **2. *Drs. Brown and Collingwood***

10 The ALJ rejected the opinions of Drs. Brown and Collingwood that Mr. Curl was
11 moderately limited in his ability to maintain attention and concentration for extended periods;
12 perform work within a schedule, maintain attendance and be punctual; and that he can maintain
13 attention for 2 hours. Tr. 25, 84, 85. The ALJ rejected these opinions for the same reason he
14 rejected Dr. Neer's opinion: that they do not reflect limitations arising from mental impairment.
15 As discussed above the ALJ erred in rejecting Dr. Neer's opinion. The ALJ accordingly similarly
16 erred in rejecting the Drs. Brown's and Collingwoods's opinions.

17 **D. Step Two Determination**

18 Mr. Curl argues, and the Court agrees, the ALJ harmfully erred by failing to find
19 depression is a severe impairment. Dr. Neer diagnosed depression and opined Mr. Curl's
20 depression and physical problems are interrelated and limiting. Drs. Brown and Collingwood
21 also opined Mr. Curl was moderately limited in his ability to perform several work related
22 functions due to mental problems. As discussed above, the ALJ erroneously rejected the opinions
23 of these medical providers about Mr. Curl's mental limitations, and did not properly assess the

1 impact of these limitations on Mr. Curl's RFC, or ask the vocational expert what impact, if any,
2 these limitations would have on Mr. Curl's ability to perform his past relevant work.

3 In determining Mr. Curl's RFC, the ALJ was required to assess all the relevant evidence,
4 including medical reports and witnesses' descriptions of limitation, to determine what capacity
5 the claimant has for work. *See* 20 C.F.R. § 416.945(a). Similarly, hypothetical questions that an
6 ALJ poses to a VE to determine what work a claimant can perform "must include 'all of the
7 claimant's functional limitations, both physical and mental' supported by the record." *Thomas v.*
8 *Barnhart*, 278 F.3d 947, 956 (9th Cir.2002) (quoting *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th
9 Cir.1995)). As this did not occur, the ALJ harmfully erred.

10 **CONCLUSION**

11 For reasons above, the Court **REVERSES** the Commissioner's final decision and
12 **REMANDS** the case for further administrative proceedings under sentence four of 42 U.S.C. §
13 405(g). On remand, the ALJ shall using the five step disability process, address what impact
14 depression has on Mr. Curl's RFC; reevaluate the opinions of Drs. Neer, Brown and
15 Collingwood; develop the record and reassess Mr. Curl's RFC as appropriate; proceed to steps
16 four and five as needed.

17 DATED this 31st day of August, 2017.

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20 BRIAN A. TSUCHIDA
21 United States Magistrate Judge
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